

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAVONN MARTELL BROWN,

Defendant-Appellant.

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UNPUBLISHED

March 20, 2007

No. 267044

Wayne Circuit Court

LC No. 05-004611-01

Before: Fort Hood, P.J., and White and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a third habitual offender, MCL 769.11, to 50 to 100 years' imprisonment for the second-degree murder conviction, two to five years' imprisonment for the felon in possession conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erred when it failed to instruct the jury concerning the lesser offenses of involuntary manslaughter and reckless discharge of a firearm. We disagree.

With regard to the involuntary manslaughter instruction, defendant's affirmative statement indicating that he was satisfied with the jury instructions constitutes express approval of the instructions and waives review on appeal. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004) (one who waives his rights may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error). Not only did counsel fail to request an involuntary manslaughter instruction or object to the lack of one, he affirmatively expressed approval of the jury instructions after the instructions were given. Accordingly, the issue is waived.

Given, however, that defendant expressly requested an instruction on reckless discharge of a firearm and his request was denied by the trial court, this issue is preserved. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). This Court reviews preserved claims of instructional error de novo. *People v Martin*, 271 Mich App 280, 337; 721 NW2d 815 (2006).

In reviewing a claim of instructional error, this Court examines the instructions as a whole, and, even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried. *Martin, supra* at 337-338. Generally, a trial court is required to instruct the jury on the applicable law and fully and fairly present the case to the jury in an understandable manner. *People v McDaniel*, 256 Mich App 165, 169-170; 662 NW2d 101 (2003), rev'd in part on other grounds *People v Francisco*, 474 Mich 82 (2006). A jury is permitted to consider necessarily included lesser offenses, but not cognate lesser offenses. *People v Cornell*, 466 Mich 335, 354; 646 NW2d 127 (2002). "[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Id.* at 357.

Defendant was charged with first-degree murder. Under *Cornell*, a jury may consider necessarily included lesser offenses, but is prohibited from considering cognate lesser offenses. *Cornell, supra* at 354. Necessarily included lesser offenses are offenses in which the elements of the lesser offense are completely subsumed in the greater offense; cognate offenses share several elements, and are of the same class or category as the greater offense, but the cognate lesser offense has some elements not found in the greater offense. *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003), citing *Cornell, supra* at 344, 356. Here, the trial court instructed the jury regarding the lesser offense of second-degree murder, but refused defense counsel's requested instruction on the lesser offense of reckless discharge of a firearm resulting in injury, MCL 752.861. MCL 752.861 provides:

Any person who, because of carelessness, recklessness or negligence, but not wilfully or wantonly, shall cause or allow any firearm under his immediate control, to be discharged so as to kill or injure another person, shall be guilty of a misdemeanor . . . .

As is apparent from the statute, the discharge of a firearm is an element of the reckless discharge offense. The charged offense, in this case first-degree murder, contains no such element. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002) (the elements of first-degree murder are that the defendant killed the victim and that the killing was either willful, deliberate, and premeditated or was committed in the course of an enumerated felony). Accordingly, reckless discharge of a firearm is a cognate lesser offense of first-degree murder, and therefore, the trial court was not permitted to instruct the jury on it. *Cornell, supra* at 354.

Defendant's second contention is that his counsel's failure to request an instruction on the lesser offense of involuntary manslaughter constituted ineffective assistance of counsel. We disagree.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *LeBlanc, supra* at 579. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *LeBlanc, supra* at 579.

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004); *LeBlanc*, *supra* at 578. Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v Rocky*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Involuntary manslaughter is a necessarily included lesser included offense of first-degree murder. *Mendoza*, *supra* at 533. The jury is permitted to consider an involuntary manslaughter instruction if it is supported by the evidence and if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense. *Cornell*, *supra* at 357. However, it is evident that counsel attempted to portray the incident as an accident, an accident which counsel expressly stated to the jury in his opening statement was caused by something short of gross negligence. Absent gross negligence or an intent to injure, defendant could not be found guilty of involuntary manslaughter. *Gillis*, *supra* at 138. Counsel's persistent emphasis that the incident was an accident involving something short of gross negligence suggests that counsel chose, as a matter of trial strategy, to forgo pursuing a conviction on the lesser offense of involuntary manslaughter in order to attempt to achieve an acquittal. This Court will not substitute its judgment for that of counsel in a matter of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). That a trial strategy is ultimately unsuccessful does not render counsel ineffective for using it. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2002). Hence, defendant has failed to meet his burden in establishing ineffective assistance of counsel.

Affirmed.

/s/ Karen M. Fort Hood  
/s/ Helene N. White  
/s/ Stephen L. Borrello